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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 736

D. I. OPERATING CO., UNITED RESORT HOTELS, INC., DESERT INN OPERATING COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented is whether a wagering pool conducted by petitioners was covered by the 10 percent wagering tax provisions of the Internal Revenue Codes of 1939 and 1954. Petitioners agree that the pool met all of the statutory qualifications except the requirement that it be "conducted for profit." 1954 Code § 4421(1)(B).[1] The Treasury Regulations under the 1954 Code define "conducted for profit" broadly, as including "the expectancy of a profit in the form of increased sales, increased attendance, or other indirect benefits." Treas. Reg. on Wagering Tax (1954 Code),

[1] Section 3285 was added to the 1939 Code by the Revenue Act of 1951, c. 521, § 471(a), 65 Stat. 452.

§ 44.4421–1(c)(4).[2] The facts as found by both lower courts put petitioner within the scope of this Regulation. Thus the only question presented by this case is the validity of the Regulation. The decision below is correct, and there is no conflict or other reason for review.

Petitioners are three corporate entities which at various times during the years involved (1953 through 1959) owned and operated the Desert Inn, a resort hotel in Las Vegas, Nevada. During these years, the Inn annually conducted a professional golf tournament, known as the Tournament of Champions, as an adjunct to which it operated a "calcutta," or wagering pool, in which the participating golfers were "purchased" at an auction held in the hotel on the night preceding the tournament. The amounts paid into the pool ranged from $93,000 in 1953 to $380,000 in 1959. At the conclusion of the tournament each year 90 percent of the pool was distributed to the winning bidders. The remaining 10 percent was retained by the Inn to reimburse it for a guaranty paid in advance ($35,000 per year, or ten percent of the pool, whichever was greater) to the Damon Runyon Fund for Cancer Research, a tax exempt organization, whose name was used as sponsor of the tournament and the wagering pool. (Pet. 22–23, 46–47; I–R 47–48.)[3]

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[2] No corresponding treasury regulation was promulgated under the 1939 Code. However, as the court below observed, if the 1954 Code regulation correctly construed the term "conducted for profit" in § 4421(1)(B) of the 1954 Code, it would also be a proper construction of the identical language in the 1939 Code.

[3] "I–R" references are to volume I of the record on appeal.

Petitioners do not deny that the wagering pool was conducted for commercial reasons. The pool was expected to and did result in financial gain for the Inn in the form of increased revenue at its gambling casino, increased patronage of its other facilities, increased attendance at the tournament itself, to which an admission charge was made, and increased profit from the overall operation of the Inn beyond the tournament period, resulting from the publicity and advertising in connection with the pool. (I–R 26–27.)[4]

The sole issue is whether the pool was "conducted for profit," within the meaning of the Code, so as to subject petitioners to the excise tax on wagers. The court of appeals upheld the validity of the applicable Treasury Regulation which states that the term "profit" includes indirect pecuniary benefits.

1. The statutory phrase "conducted for profit" is clearly susceptible to the interpretation that it includes not only gain derived directly from the wagering pool itself but also indirect commercial gain from operation of the pool. In such circumstances, the promul-

[4] The government urged below, alternatively, that petitioners' retention of 10 percent of the pool as partial reimbursement for the $35,000 guarantee paid to the Damon Runyan Fund for the use of its name constituted a direct pecuniary benefit to the Inn. Petitioners had previously deducted the amount paid to the Runyan Fund, for income tax purposes, as a business expense rather than as a charitable contribution. Although both the district court and the court of appeals rejected the government's alternative argument, both agreed that the pool had not been operated for charitable purposes. Thus petitioners' statements in the petition that 10 percent of the pool was "distributed on their behalf as a charitable contribution" (Pet. 18, see also *id.* 16) are not warranted.

gation of regulations defining the statutory language was both appropriate and necessary. Since the construction adopted in the Regulation is consistent with the statutory provisions and the underlying legislative objectives, it is entitled to the controlling weight accorded it by the decision below. *Koshland* v. *Helvering*, 298 U.S. 441, 446.

There is no merit in petitioners' criticism of the lower court's reasoning. The court of appeals recognized that the word "profit" does not have a single fixed and invariable meaning but must obviously take its content from the relevant statutory context and underlying legislative history. It then examined these sources and found support for the Regulation defining "profit," for wagering tax purposes, as including any form of sought-for pecuniary advantages. Contrary to petitioners' averment (Pet. 6), the court of appeals did not lay undue stress upon cases defining the term "profit" in other areas of the law; the court's opinion states that it did not consider these other "lines of authority * * * [as] controlling here" but rather as suggesting, "contrary to the holding of the district court, that the statute before us is not clear and unambiguous" (Pet. 50). Nor did the court below misread the legislative history of the statute here involved, as implied in the petition. (Pet. 12–13). The portions of the Committee Reports specifically dealing with the subsection here in question (1939 Code § 3285(b)(1)(B)) express an intent to exclude from tax only wagering pools "occasionally organized among friends or other associates, all the contributions being distributed to the winner or winners." H. Rep. No.

586, 82d Cong., 1st Sess., p. 56 (1955–2 Cum. Bull. 357, 398); S. Rep. No. 781, 82d Cong., 1st Sess., p. 114 (1951–2 Cum. Bull. 458, 540). Moreover, the portion of the Committee Reports dealing with the adjoining subsection (1939 Code, § 3285(b)(1)(A)), which were also cited by the court, are obviously relevant, since the two subsections manifestly have a common purpose.[5]

Both lower courts emphasized that petitioner's venture was a commercial one, "not operated for charity," but rather in the expectation of increased profits from the Inn's hotel, restaurants, bars and gambling operations (Pet. 48). Thus the decision below was clearly correct.

2. Raising arguments made for the first time on the filing of their petition for rehearing in the court of appeals, petitioners contend (Pet. 17–19) that the Ninth Circuit's construction of the term "profit" renders the wagering tax statute unconstitutionally vague. In so doing they advert to the occupational tax requirement of § 4411 of the 1954 Code and the criminal sanction for non-compliance therewith. If

[5] Nor is there merit either in petitioners' objection (Pet. 14–15) to the characterization of the wagering pool as "commercialized gambling" or in their assertion that the decision below conflicts with *Malat* v. *Riddell*, 383 U.S. 569. The concession that the pool was a wagering pool and the fact, as both courts below found, that it "was not operated for charity" but rather with expectation of a profit, (Pet. 48) carry strong implications of commercialized gambling; and obviously this Court's determination in *Malat* that the term "primarily" as used in Section 1221(1) of the 1954 Code means "of first importance" or "principally," not "substantial," raises no direct conflict with the decision below.

petitioners mean that the possibility of criminal prosecution with respect to wagering activity calls for a restrictive construction of the term "profit," it may be parenthetically observed that even where a controversy involves criminal action it is not required that a "criminal statute * * * be given the narrowest possible meaning in complete disregard of the purpose of the legislature." *United States* v. *Bramblett,* 348 U.S. 503, 509–510. In any event, petitioners are not before this Court on any criminal charge[6]; the instant proceeding is an attempt to recover excise taxes paid. Wholly aside from the fact that no constitutional question was raised below, it would be premature and inappropriate to consider such a claim of alleged constitutionality in a civil proceeding unrelated to the application of any criminal sanction. Cf. *United States* v. *Delaware & Hudson Co.,* 213 U.S. 366, 417; *United States* v. *Harris,* 347 U.S. 612, 627.[7]

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[6] The pool ended in 1959. Petitioners have not been criminally prosecuted in connection with its operation, a fact which the record does not reveal because no constitutional issue was raised below.

[7] The Court has before it this term for argument two criminal cases under the wagering tax statutes (*Costello* v. *United States,* No. 41, and *Grosso* v. *United States,* No. 181). The constitutional argument in those cases based on the privilege against self-incrimination could not be made here, since the taxpayers are all corporations and no liability is asserted against their employees. Petitioners' suggestion that they might be criminally prosecuted ignores the fact that the six-year statute of limitations (26 U.S.C. 6531, 7851) has run for the years involved (1953–1959).

[7] This Court has frequently restated the principle that constitutional questions are not to be decided in hypothetical settings. *Barrows* v. *Jackson,* 346 U.S. 249, 256; *United States* v. *Raines,* 362 U.S. 17, 21; *Zemel* v. *Rusk,* 381 U.S. 1.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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